

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1307

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

HARVEY S. MEYERS,

Defendant-Appellant.

APPELLANT'S BRIEF

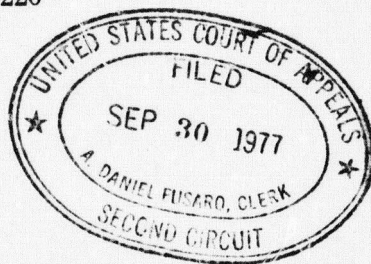
STEIN ROSEN & OHRENSTEIN
Attorneys for Defendant-Appellant
1370 Avenue of Americas
New York, New York 10019
(212) 489-0220

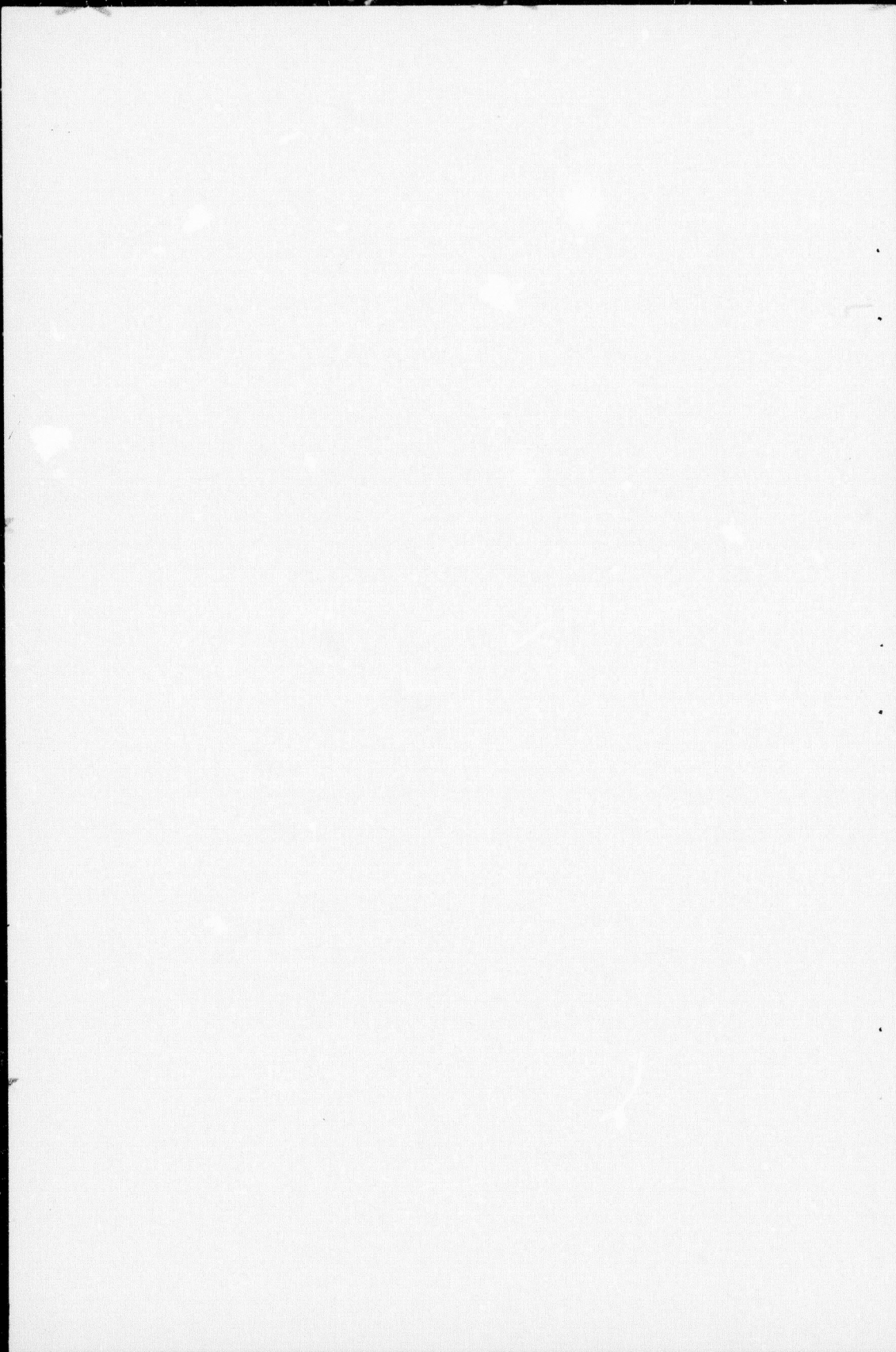
Of Counsel:

MANFRED OHRENSTEIN

On the Brief:

LEWIS M. LEFKOWITZ
MARC B. LEVENTHAL





INDEX

	PAGE
Preliminary Statement	1
Issues Presented	1
Statement of Facts	2
POINT I—	
The Government Failed to Establish Beyond a Reasonable Doubt That the Defendant, Harvey Meyers, Acted Willfully and Knowingly With Specific Intent to Evade the Payment of Income Tax	7
A. Willfully means with bad purpose or evil motive	7
B. Reliance on experts constitutes a defense to the crime charged	8
C. The court below failed to properly charge on willfulness	10
D. The Government did not sustain its burden beyond a reasonable doubt	11
POINT II—	
It Was Prejudicial Error to Admit Evidence as to the Characterization and Validity of Tax Deductions Taken by Defendant During Tax Year 1971 as to Which No Crime Was Charged in Count One When Said Evidence Was Wholly Irrelevant to the Issue of Whether the Defendant Willfully Understated His Total Income in Tax Year 1972 as Charged in Count Two	14

	PAGE
POINT III—	
It Was Error Not to Allow Defendant to Develop His Defense as to the Receipt of the \$25,000, Through the Questioning of Fernandez and Maria Meyers	32
POINT IV—	
The Lower Court Erred in Refusing to Charge in Accordance With Defendant's Request No. 3	37
CONCLUSION	40

TABLE OF AUTHORITIES

Cases:

<i>Blumberg v. United States</i> , 222 F.2d 496 (5th Cir. 1955)	28, 29
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	15
<i>Bursten v. United States</i> , 395 F.2d 976 (5th Cir. 1968) ..	9
<i>County of Macon v. Shores</i> , 97 U.S. 889 (1877)	15
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963)	16
<i>Hanson v. United States</i> , 208 F.2d 914 (6th Cir. 1953) ..	33
<i>Hartman v. United States</i> , 215 F.2d 386 (8th Cir. 1954)	10, 25, 27
<i>Holland v. United States</i> , 348 U.S. 121 (1954)	7
<i>Lurding v. United States</i> , 179 F.2d 419 (6th Cir. 1950) ..	9
<i>Marko v. United States</i> , 314 F.2d 595 (5th Cir. 1963)	28
<i>McTyre v. United States</i> , 213 F.2d 65 (5th Cir. 1954)	39

	PAGE
<i>People v. Fitzgerald</i> , 156 N.Y. 253, 50 N.E. 846 (1898) ..	37n
<i>People v. Gilbert</i> , 72 Misc.2d 75, 338 N.Y.S.2d 457 (N.Y.C. Crim. Ct. 1972)	37n
<i>People v. Trimarchi</i> , 231 N.Y. 263, 131 N.E. 910 (1921)	37n
<i>Spies v. United States</i> , 317 U.S. 492 (1943)	10
<i>United States v. Accardo</i> , 298 F.2d 133 (7th Cir. 1962)	28
<i>United States v. Armone</i> , 363 F.2d 385 (2d Cir.), cert. denied 385 U.S. 957 (1966)	37
<i>United States v. Bishop</i> , 412 U.S. 346 (1973)	10
<i>United States v. Brown</i> , 411 F.2d 1134 (10th Cir. 1969)	33
<i>United States v. Cacchillo</i> , 416 F.2d 231, (2d Cir. 1976)	37, 38
<i>United States v. Chestnut</i> , 533 F.2d 40, (2d Cir. 1976)	15, 17, 30
<i>United States v. Coblenz</i> , 453 F.2d 503 (2d Cir. 1972), cert. denied 406 U.S. 917 (1972)	10
<i>United States v. Colasurdo</i> , 453 F.2d 585 (2d Cir. 1971), cert. denied 406 U.S. 917 (1972)	30
<i>United States v. Deaton</i> , 381 F.2d 114 (2d Cir. 1967)	17
<i>United States v. Haley</i> , 452 F.2d 391 (8th Cir. 1971) ..	17
<i>United States v. Harvey</i> , 526 F.2d 529 (2d Cir. 1975)	30
<i>United States v. Kahaner</i> , 317 F.2d 459 (2d Cir. 1963), cert. denied sub nom. <i>Corallo v. United States</i> , 375 U.S. 835 (1963) rehearing denied 375 U.S. 982 (1964)	29
<i>United States v. Kaufman</i> , 453 F.2d 306 (2d Cir. 1971)	17
<i>United States v. Klein</i> , 131 F. Supp. 807 (S.D.N.Y. 1955)	15, 16, 30
<i>United States v. Klein</i> , 340 F.2d 547 (2d Cir. 1965), cert. denied 382 U.S. 850 (1965)	30
<i>United States v. McCormick</i> , 67 F.2d 867 (2d Cir. 1933)	10

	PAGE
<i>United States v. McConney</i> , 329 F.2d 467 (2d Cir. 1964)	37, 35
<i>United States v. Murdock</i> , 290 U.S. 389 (1933)	8, 10
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir. 1975), <i>cert. denied</i> , 421 U.S. 950 (1975)	15
<i>United States v. Parker</i> , 447 F.2d 826 (7th Cir. 1971)	35
<i>United States v. Pechenik</i> , 236 F.2d 844, (3d Cir. 1956)	8
<i>United States v. Philips</i> , 217 F.2d 435 (7th Cir. 1954)	10
<i>United States v. Provo</i> , 215 F.2d 531 (2d Cir. 1954)	17
<i>United States v. Ragen</i> , 314 U.S. 513 (1942)	7
<i>United States v. Schenck</i> , 126 F.2d 702 (2d Cir. 1942)	14-15
<i>United States v. Shapiro</i> , 103 F.2d 775 (2d Cir. 1939)	37, 38
<i>United States v. Wolfson</i> , 457 F.2d 862 (2d Cir. 1970)	30, 36
<i>Walker v. United States</i> , 104 F.2d 465 (4th Cir. 1939)	28
<i>White v. United States</i> , 216 F.2d 1 (5th Cir. 1954)	28
<i>Wolcher v. United States</i> , 200 F.2d 493 (9th Cir. 1952)	27
<i>Wood v. Crouse</i> , 417 F.2d 394 (10th Cir. 1953)	16

TABLE OF OTHER AUTHORITIES

Federal Rules of Evidence, R. 403	15
Federal Rules of Evidence, R. 404(a)(1)	17
Federal Rules of Evidence, R. 404(b)	17

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1307

UNITED STATES OF AMERICA,

Appellee,

—against—

HARVEY S. MEYERS,

Defendant-Appellant.

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from a judgment, dated June 17, 1977, convicting defendant, after trial by a jury on May 2, 3, 4, and 5, 1977 in the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant, Jr.) under indictment number 77 Cr. 227, of violations of 26 U.S.C. 7201, evading income taxes for the calendar years 1971 and 1972 (two counts).

Appellant was sentenced to imprisonment for a period of two years on each count, said sentences to run concurrently. Defendant was also fined \$5,000 on Count One. Defendant was continued on his own recognizance pending appeal.

Issues Presented

1. Whether the Government failed to establish beyond a reasonable doubt that the defendant acted willfully and

knowingly with specific intent to evade the payment of income tax.

2. Whether the Trial Court committed prejudicial error by admitting evidence as to the characterization and validity of tax deductions taken by defendant during tax year 1971 as to which no crime was charged in the indictment, when said evidence was wholly irrelevant to the issue of whether defendant willfully understated his total income in tax year 1972, as charged.

3. Whether the Trial Court committed error in preventing defendant from developing his defense as to the alleged repayment of a \$25,000 loan previously taken as a bad debt deduction.

4. Whether the Trial Court erred in refusing to charge in accordance with the defendant's Request No. 3, with respect to the element of reasonable doubt.

Statement of Facts

The defendant was indicted on two counts for violation of Section 7201 of Title 26 of the United States Code. The first count charged that on or about April 15, 1972, the defendant unlawfully, willfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year 1971 by filing a false and fraudulent joint income tax return wherein their total income was understated by an amount of approximately \$29,000.00.

Count Two similarly charges that on April 15, 1973 the defendant filed a return in which his and his wife's total income was understated in an amount of approximately \$82,000.00.

During the tax years in question, the defendant was and still is a member of the New York Stock Exchange. In the parlance of the investment trade he operated as a "\$2.00 Broker". This simply means that the defendant operated solely on the floor of the Exchange representing other brokerage houses in handling transactions for them. He did not have clients of his own, nor did he have any dealings with the investment public. His sole function was to execute orders on the floor of the Exchange at the request of other brokerage houses. His sole income comes from commissions paid to him by other brokers for this purpose.

The defendant bills each brokerage house upon the conclusion of each transaction by forwarding what is called a commission advice. However, with very few exceptions payments by the brokerage houses are not made to the defendant directly but instead each broker sends payments once a month to the Stock Clearing Corporation. The Corporation in turn sends the defendant a monthly payment somewhere around the fifteenth of each month, representing the total of all commissions earned during the previous month. Together with the payment, the defendant also receives a statement of account.

Because of this simplified operation, the defendant had no office to speak of, but operated his financial affairs through his personal checking account with his wife assisting him with billing and maintaining and reconciling his account.

With regard to the allegations which are the subject matter of Count One, which relates to the understatement of income for the calendar year 1971, the Government put forward the following proof at the trial:

That the defendant filed a tax return on or about April 15, 1972 which alleged his total gross receipts from commissions to be \$89,750.00, Exhibit 3.

The Government established, which is undisputed, that total gross receipts of the defendant for 1971 were approximately \$119,113.00 as determined by his Form 600 filed with the New York Stock Exchange, Exhibit 21, and as verified by the total of his own commission advices, Exhibit D.

The defendant's tax return was prepared by the accounting firm of Ernst & Ernst and specifically by a Mr. James Crumlsh. At the trial Mr. Crumlsh testified that the defendant came to his office in March of 1972 and delivered to him his various records for the tax year 1971. According to Mr. Crumlsh, the records establishing his commission income consisted of a package of commission advices around which was wrapped an adding machine tape totaling the amount of \$89,750.00 [Exhibit 4; 562A]. The defendant did not take the stand. However, his wife Maria Meyers testified that she prepared the summary of the commission advices for her husband and that the said adding machine tape was prepared by her; that at the time she worked on these summaries she had prepared a supplemental adding machine tape [Exhibit Q; 602A] containing the balance of the commission advices totaling \$29,364.00; and that she had included both adding machine tapes, together with the commission advices to which they related into one package which she had given to her husband to take to the accountant.

Mr. Crumlsh testified that he recalls receiving the packet of commission advices totaling \$89,750.00 and used this figure in reporting the defendant's commission income for the 1971 tax year. He could not recall whether he received the information regarding the additional \$29,364.00 but

could not testify that he did *not* receive this information [229A-239A; 400A; 403A-404A].

The resolution of this question is, of course, crucial in determining whether the defendant willfully understated his income for the year 1971.

Count Two of the indictment related to the defendant's income for the tax year 1972. The Government alleged at the trial that, on or about April 15, 1973, the defendant filed an income tax return [Exhibit 2] showing his total gross receipts from commission earnings to be \$100,231.00. Without dispute the Government proved at the trial that the defendant's actual gross receipts for the calendar year 1972 were approximately \$157,160.00. Additionally, the Government alleged at the trial that the defendant and his wife received repayment of \$25,000.00 loaned to the wife's brother, Marcelino Fernandez. This loan had been deducted as a bad business debt on the return relating to the 1971 tax year.

With regard to the discrepancy of commission income, the Government produced Mr. Michael Rubin, an attorney and accountant employed by Ernst & Ernst. Mr. Rubin testified that he prepared defendant's 1972 tax return; that in the spring of 1973 the defendant came to his office and provided him with a schedule of his income, expenses and deductions, together with his diary, bank statements and a packet of commission advices, indicating his income from the New York Stock Exchange. The commission advices, the bank statements and the diary were all wrapped with a string or rubber band. Wrapped around the commission advices was an adding machine tape with a total figure which matched the gross receipts entered on the schedules produced by the defendant.

Rubin prepared the defendant's joint tax return for the calendar year 1972 based upon the information supplied

to him. The defendant's wife, Maria Meyers, testified that she prepared the tape totaling the amounts shown on her husband's commission advices for the 1972 tax year. However, in performing this addition, she made a mistake in that she incorrectly added only the top commission advice from L. F. Rothchild & Co. in the amount of \$5,001.60 instead of the total for the entire Rothchild account of \$50,000.00. She also testified, however, that she prepared a second tape showing actual total deposits for 1972 [Exhibit N; 601A] which totaled \$164,988.93, which she placed on top of the stack of twelve envelopes containing the bank statements which Rubin conceded he received. Maria Meyers testified that anybody could have discovered the mistake by comparing the tape on the bank statements showing the total deposits with the tape showing the total of commission advices [364A]. Furthermore, the evidence clearly indicates that Mr. Rubin had in his possession at all times the defendant's bank statements and his statements from the Stock Clearing Corporation, all of which showed his commission income accurately at \$157,000.00.

With respect to the alleged repayment of the \$25,000.00 loan by her brother, Marcelino Fernandez, Mrs. Meyers attempted to testify that she thought that the payment made by her brother represented a share of the business her father had left to her brother [371A-372A].

Accordingly, the defendant contends that there was insufficient proof that the defendant willfully understated his income for the years in question. The defendant paid all delinquent taxes subsequent to the government's audit [Exhibits S and T; 603A-610A and 611A-627A respectively].

POINT I

The Government Failed to Establish Beyond a Reasonable Doubt That the Defendant, Harvey Meyers, Acted Willfully and Knowingly With Specific Intent to Evade the Payment of Income Tax.

It is well settled that in a prosecution such as this for an alleged substantial understatement of income in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. § 7201) the Government must establish beyond a reasonable doubt that the defendant acted willfully and knowingly with specific intent to evade and defeat a substantial part of the income tax due and owing by him for the taxable year in dispute. This specific intent must be established by evidence other than the mere understatement of income. *Holland v. United States*, 348 U.S. 121, 139 (1954); *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Coblentz*, 453 F.2d 503 (2d Cir.) cert. denied 406 U.S. 917 (1972).

The gravamen of the offense charged is the willful attempt to evade or defeat the tax:

"In a prosecution for a willful attempt to defeat and evade taxes it is not sufficient to show merely that a lesser tax was paid and was due. It is essential to prove that the acts complained of were *willfully done in bad faith and with intent to evade* and defeat the tax." (Emphasis supplied.) *United States v. Ragen*, 314 U.S. 513, 515 (1942).

A. Willfully means with bad purpose or evil motive.

It has generally been held that the use of the term "willfully" in a criminal statute means an act done with a bad purpose without justifiable excuse, or stubbornly, obsti-

nately, perversely, and has also been employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right to so act. *United States v. Murdock*, 290 U.S. 389, 394 (1933). In the *Murdock* case, it was further held that "bad faith or evil intent," was an element of the offense of willfully evading taxes under predecessor statutes to 26 U.S.C. § 7201. In his opinion for the Court, Justice Roberts stated:

"Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, . . . or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." 290 U.S. at 396.

As recently as 1973, the Supreme Court has reaffirmed its consistent interpretation of the word "willfully" to require an element of *mens rea*, holding that in both tax felonies and tax misdemeanors it would continue to require "the bad purpose or evil motive described in *Murdock*, *supra*." *U.S. v. Bishop*, 412 U.S. 346, 361 (1973).

B. Reliance on experts constitutes a defense to the crime charged.

In the absence of sufficient proof on the question of willfulness, the Government's case must fall. Thus, it has been held that where all that the Government established was a case of mistake, such mistake, standing alone, was not sufficient to sustain a conviction. *United States v. Pechenik*, 236 F.2d 844 (3d Cir. 1956).

In *Pechenik* the individual defendant was found guilty on the basis of corporate income tax returns which he signed as President which had been prepared by an outside

accountant from the books and records maintained by an employee of the corporation. On the returns in issue certain capital expenditures had been treated as operating expenses, the full amount of which were deducted in the taxable years in which payment was made, thus incorrectly increasing the corporation's expenses and correspondingly decreasing its net income by charging off in a single year expenditures which should have been charged over a period of years to depreciation. Since nothing in evidence permitted the conclusion that the defendant knew substantially all the corporate capital expenditures were charged off as operating cost or that the defendant understood that the procedures employed by the bookkeeper and accountant were inadequate and erroneous, the District Court was directed to enter a judgment of acquittal.

Likewise, it has been held that in a prosecution for income tax evasion under 26 U.S.C. § 7201, the defendant was entitled to a charge by the Judge to the jury that if they found that the defendant had discussed this matter with a competent tax preparer and had given him the full facts and circumstances and that the tax return had been prepared pursuant to that advice, then the jury should find that the defendant did not willfully file a false return. *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968).

Likewise, in *Lurding v. United States*, 179 F.2d 419 (6th Cir. 1950) the Court ruled that since the crux of the offense charged was the willfulness of the understatement of the income, it was not an immaterial circumstance that the taxpayer did not prepare the return but had employed a bookkeeper and tax accountant and had relied upon them for advice as to his tax liability. Accordingly, where the Trial Court had erroneously instructed that this circumstance was immaterial, the conviction was reversed and re-

manded for new trial. See also *United States v. Philips*, 217 F.2d 435 (7th Cir. 1954); *Hartman v. United States*, 215 F.2d 386, 394 (8th Cir. 1954).

The foregoing cited cases are in accord with the general proposition announced by the decision of this Court that a taxpayer's reliance upon the advice of an attorney, accountant, or tax expert to whom he has given full information as to all pertinent facts, constitutes a defense against a charge of willfully attempting to evade or defeat an income tax. *United States v. McCormick*, 67 F.2d 867 (2d Cir. 1933); *United States v. Coblenz*, 453 F.2d 503 (2d Cir. 1972), *cert. denied* 406 U.S. 917 (1972).

C. The court below failed to properly charge on willfulness.

In the instant matter, the court below gave a charge on this element of the crime allegedly committed by the defendant substantially in accord with the cited cases. [523A-528A]. However, it should be noted that the trial court did not charge that willfulness requires "bad faith or evil intent" (*United States v. Murdock, supra*, 290 U.S. at 398) or "evil motive and want of justification in view of all the financial circumstances of the tax payer" (*Spies v. United States, supra*, at 317 U.S. at 498) or "bad purpose or evil motive" (*United States v. Bishop, supra*, 412 at 361), although the Court did state that willfulness involves "an evil state of mind" [524A]. However, in light of the foregoing cited cases, we respectfully suggest that the trial court's charge to the jury on this element did not accentuate the Supreme Court's requirement of "bad purpose or evil motive" in view of the defendant's specific request to so charge [Defendant's Request No. 7 (16A)]. This failure to adequately explain to the jury the requirement of bad purpose or evil intent in order to obtain a conviction under 26

U.S.C. §7201, requires a reversal of the defendant's subsequent conviction.*

D. The Government did not sustain its burden beyond a reasonable doubt.

Even had the trial court's charge been adequate on this issue, we would respectfully submit that on the basis of the evidence provided, the Government has not sustained its burden in this regard and the case should never have gone to the jury. A review of the testimony will indicate that for each of the years involved the defendant turned over all of his financial information to his accountants and relied upon them to prepare the necessary income tax returns. Under the cited cases and authorities, the fact that mistakes were made in the addition of the numerous commission advices, which were the only evidence in the taxpayer's possession at the time the returns were prepared which showed his total income for the preceeding tax year, was insufficient to establish a willful attempt to evade income taxes.

Thus, for the tax year of 1972, it was clear that the defendant gave all his financial information to his accountant. Harvey Meyers not only gave Ernst & Ernst a schedule of his income, expenses and deductions but he also gave them his diary, bank statements and copies of all his commission advices representing all the transactions he had on the floor of the exchange [61A]. The accountant never requested additional documents from defendant after their first meet-

* Consistent with his refusal to allow the defense wide latitude in attempting to negate willfulness [Point III, *infra*], the trial court also refused to grant the second paragraph of defendant's Request No. 8 (17A) relating to the lack of willfulness because of the relationship between the wife and the defendant and the wife and her brother.

ing in regard to the 1972 returns [111A]. The accountant based everything on the documents supplied by the defendant [109A]. The defendant's wife testified that she did most of her husband's bookkeeping and was responsible for totaling the commission advices for each of the years in question [343A-345A, 373A]. With respect to 1972, she testified that she apparently made a mistake in not adding up all the slips of the L.F. Rothchild Account [364A-365A]. However, this mistake was readily apparent by either checking the witness's figures or by comparing her total to the total deposits which the accountant could easily have obtained from either the bank statements which he had from 1972 or from the adding machine tape [Exhibit N; 601A] which the witness testified she prepared and presented to the accountant with the statements. [359A-360A; 364A-365A].

The accountant Rubin testified that he had not taken either of these comparatively simple steps [72A, 81A]; yet the accountant for 1971 (Crumlish) testified that he compared the commission advices to the adding machine tapes [180A] and Rubin admitted that a basic procedure in trying to determine income is to look at deposits in a business bank account. [122A]. One of the very first things that the agent Grau did when he initially audited the 1972 return was to examine the bank statements and compile a total of the deposits for the year 1972 [82A-83A]. It was then readily apparent that an error had been made in recording the defendant's gross receipts. Had the accountant taken this elementary step at the time he prepared the return, he would have discovered Maria Meyers' mistake and the defendant's commission income would never have been understated on the return.

In light of these facts and circumstances, we respectfully submit that the Government failed totally to make out a

case for willful understatement of commission income for 1972.

This would have only left the failure to report the repayment of the \$25,000 Fernandez loan which had been deducted as a bad debt in 1971. As the trial judge noted, if that had been all that the Government had in this case, he would have thrown the case out because it was easy to understand how a person could collect a bad debt and forget to report it. [418A:19-419A:5]. Accordingly, in view of the foregoing, it was error for the court below not to enter a directed verdict of not guilty on Count Two on the indictment.

With regard to Count One of the indictment which related to the year 1971, the facts are not as clear cut as they were for 1972. However, we would still suggest that the case should never have gone to the jury. Maria Meyers testified that she prepared two tapes with respect to the commission advices for 1971 [347A-349A]. The amount on the two tapes [Exhibit 4 (562A) and Exhibit Q (602A)] totaled the entire amount of the defendant's commission receipts for 1971. The accountant who prepared the 1971 return, James Crumlish, testified that he did not recall seeing a second tape as part of the materials presented to him by the defendant. [400A]. However, the witness also had no recollection of seeing a large number of other items which he must have examined since the information contained on them was used by him to complete various schedules to the returns. [229A-239A; 403A-404A]. Again, on this state of facts, we would respectfully suggest that there was insufficient evidence that the defendant intended to willfully evade income taxes for 1971. The most that the government showed was negligence or gross negligence, and as noted above, this is not sufficient to establish a willful intent to evade taxes. Accordingly, the First Count

should also not have been permitted to go to the jury. Rather, defendant's motion for acquittal at the close of the Government's case should have been granted.*

POINT II

It Was Prejudicial Error to Admit Evidence as to the Characterization and Validity of Tax Deductions Taken by Defendant During Tax Year 1971 as to Which No Crime Was Charged in Count One When Said Evidence Was Wholly Irrelevant to the Issue of Whether the Defendant Willfully Understated His Total Income in Tax Year 1972 as Charged in Count Two.

At the very outset this Court must be reminded that the defendant, Harvey Meyers, was charged in Counts One and Two of the indictment with violations of 26 U.S.C. §7201 that he "did unlawfully, willfully, and knowingly attempt to evade and defeat a large part of the income tax due and owing by him . . . to the United States of America" [for the calendar years 1971 and 1972, respectively] [581A-519A]. Each of these two counts explicitly charged in the indictment that defendant evaded the income tax laws by the method of *understating income* for each year. Nothing prevents the Government in a Section 7201 tax evasion case from specifically charging a defendant with taking a *fraudulent deduction* from gross income, in addition to charging a failure to report income received. *United States v.*

* In the above discussion we have confined ourselves to the question of insufficiency of evidence. In Point II *infra*, we will discuss at length the admission into evidence of certain irrelevant and prejudicial matter. We respectfully urge the court that the two points must of necessity be considered together. If the evidence of guilt was weak, in the first place, the admission of prejudicial matter must be given great weight in determining whether the jury could have made a reasonable judgment based upon sufficient evidence.

Schenck, 216 F.2d 702, 704 (2d Cir. 1942), *cert. denied*, 316 U.S. 705. The Government made no such charge in this case. Yet, the Government, at the trial, spent a great deal of time planting notions of fraud in the jurors' minds, which solely related to deductions taken during the relevant tax years. We contend that admission of such evidentiary material as to crimes not charged was clearly prejudicial and denied defendant of his right to a fair trial.

It is a well known doctrine, dictated by logic and fair play, that for evidence to be admissible in a criminal trial, it must be strictly relevant to the particular offense. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States*, 391 U.S. 123, 131 fn. 6 (1968). "Irrelevant and incompetent testimony should always be carefully excluded, because the tendency of both is to mislead and confuse the minds of the jury and thus defeat the ends of justice". *County of Macon v. Shores*, 97 U.S. 889 (1877). It is equally well established, as the following case law will show, that if prejudicial error is committed by a trial court, such error is fatal to any conviction, even if there may have been enough evidence otherwise to have convicted a particular defendant.

In determining whether a particular piece of evidence proffered is prejudicial or not, it is well settled in the Second Circuit that the court should employ a weighing test, to wit: the probative value of evidence put forth as to a specific offense must outweigh the danger of unfair prejudice, confusion of the issues or misleading the jury. *United States v. Chestnut*, 533 F.2d 40, 49 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir. 1975) *cert. denied*, 421 U.S. 950 (1975); *United States v. Klein*, 131 F. Supp. 807 (S.D.N.Y. 1955); Federal Rules of Evidence R. 403.

In the *Klein* case defendants were indicted for collaborating in the filing of a false income tax return by one of them and for conspiracy to evade income taxes. The trial court held, per Sugarman J., that alleged violation of Office of Price Administration regulations and testimony of proof thereof was inadmissible, where "... such proof would tend to create hostility and a confusion of issue that would far outweigh its probative value." 131 F.Supp. at 818. The *Klein* Court further stated that: "The first axiom of admissibility is that none but facts having rational probative value are admissible." 131 F.Supp. at 810. In other words, in order to reach the balancing test of probativeness versus prejudice, the evidence must first, of course, be probative. It is clear that the evidence relating to deductions was not only replete with prejudice, but proved nothing at all.

The prosecution will undoubtedly argue that the evidence complained of has some tangential relationship to the element of willfulness. It is clear from the United States Attorney's own conduct and statements that evidence as to willfulness was used as a guise to introduce evidence as to the defendant's general character in order to confuse the jury and prejudice them against the defendant.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963) Chief Justice Warren stated the standard to be applied at a criminal trial:

"We are not concerned here with whether there was sufficient evidence on which the Petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." at 86. See also *Wood v. Crouse*, 417 F.2d 394, 399 (10th Cir. 1969).

In the case at bar there was not only contribution by the evidence asserted herein as prejudicial, but the Government designed its whole case around showing that the defendant was a bad man, well beyond the bounds of trying to prove the intent to commit the specific crimes with which defendant was charged. Evidence of other offenses is not admissible merely to show a defendant's criminal character. *United States v. Chestnut*, *supra*, 533 F.2d 49; *United States v. Deaton*, *supra*, 381 F.2d at 117; Federal Rules of Evidence R. 404(b). Intent and willfulness are not a *carte blanche* for the prosecution to purposely besmirch the character of a defendant with its "badges of fraud" in a way that has nothing to do with the case at bar. The character of the appellant was not even in issue. He neither took the stand himself nor offered character evidence. Compare *United States v. Kaufman*, 453 F.2d 306, 310 (2d Cir. 1971); *United States v. Chestnut*, *supra*, 533 F.2d at 44; *United States v. Provo*, 215 F.2d 531, 537 (2d Cir. 1954); Federal Rules of Evidence R. 404(a) (1).

When this Court examines those portions of the transcript and exhibits cited below, we urge it to consider, along with any balancing test it may apply, whether the introduction of such evidence was not a trial tactic deliberately pursued by the Government. The Eighth Circuit, in *United States v. Haley*, 452 F.2d 391, 396 (8th Cir. 1971), *cert. denied*, 405 U.S. 978, strongly discouraged such practices, by stating:

"We fully recognize that in judging the issue of whether defendants had a fair trial, when the Government *deliberately* engages in prejudicial proof it may be estopped to deny the prejudicial effect on the jury regardless of the strength of its case." [citations omitted] [emphasis supplied].

In Count Two the defendant was charged with and convicted of evading income tax by understating his income for the 1972 tax year in the amount of \$81,920. The Government alleged, in part, that the defendant did not include in his 1972 taxable income the repayment of a \$25,000 loan which defendant had deducted as a bad debt the previous taxable year.

Obviously the Government had to prove that defendant took a deduction for a bad debt in 1971, that the defendant was fully repaid in 1972 and that the defendant did not report this repayment as income for 1972. However, the Government does not stop there. Instead with the acquiescence of the trial court, it presented evidence to show that the bad debt deduction taken for the 1971 tax year should not have been characterized as one arising from a *business* loan, but rather as one resulting from a *personal* loan, although there was no charge in Count One that defendant fraudulently characterized that deduction. The United States Attorney then went on to show that additional taxes are owed to the Government as the result. Again this was not made part of the Government's charge of tax evasion for the 1971 tax year.

At the very first instance that the prosecution attempted this kind of approach, in its direct examination of Mr. Crumlish, the accountant who prepared defendant's 1971 tax return, the Court interceded in an exchange that is quoted below *in toto* (192A-193A):

"The Court: If I understand correctly and I am sure you will enlighten me if I am mistaken the Government did not contend that the deduction in '71 was unlawful but rather the failure to disclose the repayment in 1972 constituted the evasion of tax.

Mr. Jossen: Your Honor, we do not change from

that position. However, I will say on the question of willfulness which Mr. Gallop has specifically placed in issue, we now have evidence which will show that the documentation supplied to Mr. Crumlish in connection with that bad debt was false.

The Court: False in what manner?

Mr. Jossen: That in fact No. 1 the debt was not bad and No. 2 that it was not a business debt.

We will show it through other documents. We still contend even if it had been treated properly as a business bad debt it should have been declared as income next year. That position does not change.

On the question of willfulness I submit the Government is clearly entitled to prove that the defendant submitted altered documents and documents he knew were not true.

The Court: Well, all right."

Mr. Jossen, for the Government, states clearly that he wanted to show that the debt for which defendant took a deduction "was not a business debt". Yet in the very next breath, Mr. Jossen states that:

"We still contend even if it had been treated properly as a business bad debt it should have been declared as income next year. *That position does not change.*" [emphasis supplied].

In other words, the Government wanted to have its cake and eat it too. Not only that, it now became necessary for the jury to decide this side issue and whether such evidence was relevant to the crimes charged.

We are at a loss to understand what in the Government's argument changed the Court's mind from its original inclination that such questioning as to the type of bad debt

had nothing to do with the case. Nothing in the above colloquy indicates that the trial court seriously undertook the task of weighing probative value versus inherent prejudice as required by the cited cases.

Nor was the matter of the type of debt deduction a side issue, to be brought out only casually by the Government in the presentation of its case. The Government dredged up the issue again and again. Mr. Jossen questioned Mr. Crumlish [192A-194A]:

"Q. On what schedule was the bad debt taken? A. Schedule C.

Q. Now, Mr. Crumlish, is there any difference between a business bad debt and a personal bad debt for income tax purposes? A. Yes, there is.

Q. Would you tell us what the difference is?

* * *

A. The difference is that as a business bad debt, the amount is deductible in full. As a personal bad debt, the amount that would be deducted would be treated as a short term capital loss deductible against capital gains.

If there are no capital gains the deduction would be limited to \$1,000 against ordinary income.

Q. Is a personal bad debt deducted on the same schedule as a business bad debt? A. No, it is not.

Q. What schedule is used for the deduction of a personal bad debt? A. Schedule D.

Q. Is it your testimony then Mr. Crumlish, that a personal bad debt absent capital gains is limited to a \$1,000 deduction in any given year? A. At this time yes. The law has changed so in '77 it will be \$2,000 and in '78 it will be \$3,000.

Q. In 1971 and 1972? A. It was \$1,000.

It escapes us as to what any of the foregoing has to do with the willful intent to understate income for tax year 1972 as charged in the indictment. At two more distinct times in the trial, *after* placing in evidence its testimonial and documentary proof that defendant was repaid the loan for which he took a bad debt deduction, the Government continues to hammer away at the alleged erroneous characterization of that deduction as business rather than personal [252A, 280A, 326A-328A]. The prejudice is now being cemented squarely in the minds of the jurors. The jury's attention is riveted on elements which have very little, if anything, to do with the crimes for which appellant was tried. In the absence of clarifying instruction from the court this had to confuse and mislead the jury.

In Mr. Jossen's direct examination of Marcelino Fernandez, the brother-in-law of the defendant and a primary Government witness to whom immunity had been granted, Fernandez was asked repetitively (i.e. 252A & 280A) if the \$25,000 received from Mr. Meyers was a personal loan, to which Fernandez answered in the affirmative. He conceded, however, that he had deposited the defendant's check in his business account [252A]; he put the \$25,000 into the business [280A, 299A]; the money came out of the company to repay the loan [275A-276A]; it was entered as a loan on the company books [301A; 305A]; the checks in alleged repayment were written on the company's account at the witness's insistence [305A-306A; Exhibits 10, 11, 12 and 13 (564A-567A)]; and the receipts evidencing the loan and its alleged repayment were on company forms signed by the company [306A-308A; Exhibits 15, 16 and 17 (569A-571A)].

To give legitimacy to all this the Government now must have its "expert" pound the final nails into the coffin. Mr. Buchbinder, who was not qualified or offered as a tax ex-

pert but was called to explain the Government's chart which details what the correct figures should have been on the defendant's return [326A-328A], testified upon direct examination as follows:

"Q. Now, can you tell us, Mr. Buchbinder, whether there is a difference between a business bad debt and a personal bad debt? A. A business bad debt can be deducted dollar for dollar. In other words, it can be deducted if you have a \$10,000 business bad debt and you have a \$20,000 salary, then you can offset the \$10,000 against the \$20,000 and report just \$10,000 as your income.

Whereas, as a non-business bad debt, there is a limitation on that. A non-business bad debt is considered on Schedule C as a short-term capital loss and there is a limitation on this deduction to the extent of \$1,000 a year.

Q. And that is filed on Schedule what? A. D.

Q. Now, Mr. Buchbinder, if a taxpayer had deducted a bad debt in one year, regardless of whether he treated it as a business bad debt or as a non-business bad debt and thereafter recovered that money in the next year, is it correct that the amount would have to be declared as income in the following year, to the extent that the taxpayer had achieved a benefit from the deduction in the prior year? A. That's correct.

Q. Is it correct then that a business bad debt is in general more favorable to a taxpayer than a non-business bad debt?

Mr. Gallop: I will object to that question.

The Court: I will sustain that question as to the form of that question. He may bring out what circumstances or under what circumstances one is more favorable than the other.

Q. Mr. Buchbinder, can you tell us under what circumstances a treatment of a debt as a business bad debt as opposed to a non-business bad debt would be more favorable to a taxpayer, if any? A. Well, a business bad-debt, as I said before, could be deducted dollar for dollar against other income. Whereas, a non-business bad debt cannot be deducted that way." [334A-335A]

In the same context, the Government repeatedly alluded to two particular exhibits. Government Exhibit 9 [563A-1], a copy of the check for \$25,000 from Harvey Meyers to Marcelino Fernandez, was introduced as evidence of the initial loan and/or monies forwarded to Fernandez. On the front of that check the words "personal loan" were written over two lines. Government Exhibit 9A [563A-2] is purportedly the same check, but this time, as the Government points out in its summation, it now bears the notation "personal investment in P.R., loan for joint participation in business transactions." The implication is clear that the defendant entered these words after the check had been returned to him in order to justify the business loan deduction. How could a reasonable juror dissociate this evidence with regard to a tax evasion which was not charged, from the crime of understating his 1972 income with which he was charged?

The Government certainly never lets the jury forget this matter. Exhibit 9A is referred to in Government's direct examination of Mr. Crumlish [179A and 190A]; and in the Government's direct examination of Mr. Fernandez [249A]. Even a special witness from the bank, Mr. Cadamatori, is called solely to draw the inference someone wrote on the check after the fact [236A].

It is clear that this trial strategy by the Government had nothing to do with the element of willfulness and intent.

Mr. Jossen eloquently states in his summation, what it is all about. [439A-440A]:

“Why is this significant? [The notation on the check—Government’s Exhibit 9A] [our brackets].

Because this is the form of the check as it is shown to James Crumlish in 1972 to support a deduction of this \$25,000 as a business bad debt. You know why this is significant because you have heard testimony about it. That if this is a bad business debt the full \$25,000 comes off as a deduction. But if it is a non-business bad-debt, if it is a personal debt, a personal loan, it is limited to \$1,000 a year and you can draw the inference from that as to why it is to significant for Harvey Meyers to have altered Government’s Exhibit 9A to make sure he had some support for calling this \$25,000 Fernandez loan a business investment.”

Didn’t the fact that it was a business or personal loan have nothing to do with the crimes charged? Wasn’t all this just supposed to go towards showing the willfulness in understating income? Precisely! The “badges of fraud” hyperbole which the Government laces throughout its summation is but a thin smokescreen.

None of this had anything to do with the element of willfulness. It is an argument as to the defendant’s character, which is not in issue.

In the same vein Mr. Jossen introduced more prejudicial characterization. In that same summation [440A-441A] he referred to Exhibits 24 [572A] and 31 [576A], which are the last page from defendant’s 1971 diary and the first page of his 1972 diary, respectively. Although admitted into evidence, no testimony was taken at the trial which related to these documents. What they purportedly show is that the defendant had entered the same \$109 dinner expense on

December 29, 1971 and January 3, 1972. The Government never elicited any evidence or in any way attempted to prove that the defendant deducted this expense on his tax returns in both years. Nevertheless, Mr. Jossen cannot leave any stone unturned, no matter how devoid of probativeness [441A]:

"A badge of fraud. A double entry. Taking the deduction twice. A small thing, yes, but when you add the small things together, they show you the nature of the person's actions and their intentional actions."

This is exactly what the Courts have been guarding against in the cited cases. They have not allowed "small things" with minimal probative value and a high degree of prejudice to be admitted into a criminal case.

In a case with striking similarity to our own, *Hartman v. United States*, 215 F.2d 386 (8th Cir. 1954), a taxpayer was convicted on both counts of a two count indictment charging attempted evasion of income taxes by filing false income tax returns for the years 1945 and 1946, respectively. The facts and holding of that case bear close scrutiny because the Eighth Circuit Court of Appeals reversed the judgment of conviction on both counts finding prejudicial error in the admission of irrelevant evidence not unlike and every bit as probative as our own in the trial of charges of failure to include certain items as taxable income. The defendant there did not make out his own income tax returns but relied, rather, on his accountant, i.e., willfulness was in dispute as much as it is here. The Government introduced evidence to the effect that defendant formed a family partnership in order to reduce his income tax liability. The defendant was not charged with any crimes relating to these transactions.

"If defendant here had been indicted for tax fraud in connection with the formation and carrying on of a

family partnership to evade income tax, such offense could have been specified in an issue in respect to such charge which could have been framed, rendered understandable and passed on by the jury. But here, as pointed out, the charge of the first count was simply that defendant had received two certain items of taxable income from his Hunter-Hartman Corporation and had attempted to evade the tax in respect to those two items.

* * * *

"The inevitable effect of injecting a mass of expert, highly technical evidence about defendant's formation and carrying on of a family partnership to reduce income taxes could only be to distract the attention of the jury from the issue they had to try and was necessarily prejudicial to defendant." 215 F.2d at 392.

There, too, the Government produced an expert, to wit: a Revenue Agent Accountant, who testified at length concerning the book entries relating to the two items and then was asked if in his opinion there was additional income which defendant received during 1945 and failed to report which was not included in the charge of the indictment. The Court unambiguously held that the rendering of such an opinion was plain error:

"He was charged with a certain offense and was then confronted with the opinion of the Government officer that he was guilty of other additional unrelated offenses. It was plainly error to submit that opinion of the agent for the consideration of the jury. It cannot be doubted that the opinion expressed by the officer would carry weight with the jury and it must be held that the error in receiving it was prejudicial" 215 F.2d at 392-3.

Appellant fails to see any distinction between that testimony and the Buchbinder testimony. Lastly, as if to shed light on every shadow of prejudicial evidence in our case, the *Hartman* Court also dealt with extended testimony which was received relating to expense accounts. The matter was foreign to anything charged in the first count of the indictment and the Court was quick to note that:

"The matter of cheating on expense accounts is a well-known fraud and the testimony about it in the record here stands out conspicuously from the mass of technical accounting evidence. It could not have any other effect on the trial than to prejudice the jury and divert attention from the issue." 215 F.2d at 393.

In his summation Mr. Jossen referred to irrelevant expenses and moralized as to how small things add up. The Eighth Circuit referred to this as well in summing up the problems of a trial based solely on the villification of the defendant:

"The cumulative effect of a mass of evidence outside the scope of the indictment that was brought into the trial was to obscure the issue and to permit conviction that may well have been based on the general character of defendant . . . although it has been argued here that the extraneous matter was admissible to establish intent, the record does not support that justification of the admissions in evidence. In order for wrongful acts not included in a charge to be admissible to prove intent they must be of such a character that as a matter of logic they tend to demonstrate a criminal intent in the acts within the charge. *Wolcher v. United States*, 9th Cir., 200 F.2d 493.

* * * *

"The over-all effect of the mass of evidence extraneous to the issue was to allow the jury to suspect that defendant was a bad character. His right was to be tried for the specific offense charged against him." 215 F.2d at 393-4.

Other Circuits, as well, have dealt firmly with the Government's attempt to interject prejudicial extraneous matter not specifically and directly related to the actual crime charged, even when such was done to go to the matter of the intent or credibility of the defendant when charged with criminal violation of the tax laws. *Blumberg v. United States*, 222 F.2d 496 (5th Cir. 1955); *Marko v. United States*, 314 F.2d 595 (5th Cir. 1963); *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962); *Walker v. United States*, 104 F.2d 465 (4th Cir. 1939); *White v. United States*, 216 F.2d 1 (5th Cir. 1954).

In *White* it was the defendant that wished to put forth the testimony of an expert witness that income received by the defendant under a certain contract should have been properly classified as a long term capital gain and not as ordinary income, thereby lessening defendant's tax liability. The defendant had not reported the income as either. Since there, as here, the characterization of the income was wholly irrelevant, the Fifth Circuit held that the trial court had properly excluded the expert's testimony.

Moreover, in *Blumberg*, which involved a prosecution for willful attempt to evade federal income taxes, the Government tried the case under the theory that specifically accounted for income had not been reported. Accordingly, the Court held that admission of evidence that the defendant's wife took \$30,000 in cash to New York and deposited part of it in the bank of the man whose son was marrying her daughter and that, then, large expenditures were made

by the accused and his wife for an expensive wedding party, was prejudicial error. This was so even though it was the claim of the Government that the omissions were due to intention rather than oversight. More significantly, the Court in *Blumberg* pointed out that even had this evidence been admissible, at the very least, the jury should have been instructed with a charge as to the limits and purposes of such evidence.

Similarly in this case, assuming *arguendo* that the prejudice of the evidence presented to this Court did not outweigh its probative value at trial as to willfulness, the Court below seriously erred in not charging the jury that all said evidence was presented to them for that sole, limited purpose of proving intent. The Second Circuit has clearly adopted this approach. In *United States v. Kahaner*, 317 F.2d 459 (2d Cir. 1963), *cert. denied sub nom., Corallo v. United States*, 375 U.S. 835, *rehearing denied*, 375 U.S. 982, Judge Friendly, writing for this Court, stated:

"There can hardly be doubt that the evidence passed the basic test of relevancy; 'the evidentiary fact offered does not need to have strong, full, superlative, probative value, does not need to involve demonstration or produce persuasion by its sole and intrinsic force, but merely to be worth consideration by the jury,' 1 Wigmore, *Evidence* (3rd Ed. 1940), 411 . . . The Court's restriction on the purpose for which the Jury might consider the evidence, although doubtless wise, thus operated to defendant's advantage." 317 F.2d at 471.

Thus, Judge Friendly noted with approval that, even in the light of clearly relevant evidence:

"the Court expressly narrowed the purpose for which the evidence could be considered . . . [and] the judge's

conclusion that the relevance of this evidence outweighed any tendency to undue prejudice with the cautionary instruction he repeatedly gave was in no manner an abuse of discretion; indeed we think exclusion of the evidence would have been wrong." 317 F.2d at 471.

Likewise, in *United States v. Chestnut*, *supra*, 533 F.2d at 50 (2d Cir. 1976), Justice Meskill, in a case relating to campaign contributions, stated:

"Judge Weinfeld admitted this testimony with a limiting instruction to the Jury that its relevance confined solely to the issue of willfulness or intent; the District Court repeated this restriction in its charge to the jury.

"Given the trial court's cautionary instructions we cannot find that admission of this evidence was reversible error. The 'similar acts' occurred in close temporal proximity and were closely related in both subject matter and manner to the crime charged in the indictment."

See also *United States v. Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States v. Klein*, 340 F.2d 547, 548-549 (2d Cir. 1965), *cert. denied*, 382 U.S. 850 (1965); *United States v. Wolfson*, 457 F.2d 862, 869 (2d Cir. 1970); *United States v. Harvey*, 526 F.2d 529, 536 (2d Cir. 1975). No such corrective instructions were ever given in this trial, either at the time the testimony was offered or at the time the jury was generally charged. Such a charge would have lessened or limited the prejudicial effect of the evidence discussed herein.

Looking at that evidence, the failure of the Judge to weigh same in the traditional balancing test discussed above, the repetitious offer of same, the self-admitted pur-

pose of the prosecution to use it for character assassination and development of a crime not charged and the failure of the trial judge to give cautionary instructions requires this Court to give serious consideration to reversing defendant's conviction. The prejudicial impact of this entire line of evidence is clear when one bears in mind that, as noted above, Mr. Fernandez himself also treated the loan as a business rather than personal item.

We are confident that this Court will find that prejudice and error permeated the trial below. The difficult chore placed before this Court then becomes to determine just how far it did permeate. It is contended that nothing less than a complete reversal and remand would satisfy the ends of justice. The case for reversal is most compelling with respect to Count Two. As discussed in Point I of our brief, the Government's evidence regarding this Count had great weakness. With regard to the defendant's commission income the evidence was uncontroverted that while the defendant understated his total receipts on the adding machine tape he submitted to his accountants, those same accountants ignored all of the defendant's records which were submitted to them at the same time, and which contained his correct income. Furthermore, the defendant's defense and explanation regarding repayment of the \$25,000 was frustrated by the Trial Court (Point III, *infra*).

Thus, the prejudice created by extraneous issues must have had a devastating effect on the jury's deliberations in considering the question of mistake versus willfulness.

With regard to Count One, the Government's evidence purported to show that the defendant give his accountant a summary and documents of his commission income which were in error in the amount of some \$29,000. The defendant's wife, on the other hand, testified that she had prepared a second tape attached to documents which disclosed

the balance. The defendant's accountant simply did not recall as to whether or not he received this additional documentation.

Again, the prejudicial matter referred to above could not help but adversely affect the jury's judgment in evaluating the question of mistake versus willfulness. Accordingly, we respectfully urge that the entire conviction be reversed and remanded for a new trial free from error.

POINT III

It Was Error Not to Allow Defendant to Develop His Defense as to the Receipt of the \$25,000, Through the Questioning of Fernandez and Maria Meyers.

The Government charged, and sought to prove that defendant failed to include as income in his 1972 tax returns a \$25,000 item which had been repaid to him in that year although taken as a bad debt deduction in the prior year. It was brought out at the trial that this loan was made from the defendant to Marcelino Fernandez, defendant's brother-in-law. Once the trial court determined that a prima facie case had been made out on behalf of the Government (defendant's motion to dismiss at the end of the prosecution's case was denied), it was substantial and plain error for the court below to refuse to allow the continuous attempts of defendant's trial counsel to show that defendant and his wife "thought" that the \$25,000 received from Fernandez was for another purpose and thus that defendant lacked the willfulness required for conviction. The defense was shackled in its attempt to expand upon any reasonable doubt in the minds of the jurors and was effectively restrained from negating any willfulness to commit the crime charged which had been laid upon the defendant by the Government.

In *United States v. Brown*, 411 F.2d 1134 (10th Cir. 1969) defendant was also prosecuted for an income tax evasion. The lower court excluded transcripts of prior sworn oral testimony which defendant sought to proffer to negate intent. The Tenth Circuit Court of Appeals reversed and remanded, stating: "Accordingly, the accused as part of his defense is entitled to wide latitude in the introduction of evidence that tends to show lack of specific intent." 411 F.2d at 1137.

In the same vein, see *Hanson v. United States*, 208 F.2d 914 (6th Cir. 1953) wherein defendant offered to show that money held by him was not his unreported income, but was the money of the corporation in which defendant owned a majority of the stock. This proffered evidence was excluded by the trial court. The Court of Appeals reversed the conviction of income tax evasion and remanded, finding prejudicial error in not allowing the defense to present this explanation.

This court is referred to the cross-examination of Marcelino Fernandez by defense counsel [308A]. Mr. Gallop refers to Government's exhibits 16 and 17 [570A and 571A, respectively] which are the two receipts which the Government alleges show that the pay-back from Fernandez to Meyers was for the loan deducted as a bad debt the year before. Mr. Gallop begins:

Q. Both receipts begin with the same phrase, I received from Frozen Foods, Inc.

Is there any indication on either receipt that this money was originally given to you as a personal loan?

The Court: They are in evidence and they speak for themselves and we are wasting time. Go on to next question. They may be read to the jury or shown to the jury and the members of the jury may

look at any exhibits they want during the deliberations."

The trial court shows an identical impatience when Mr. Gallop once again begins to develop evidence as to the nature of the pay-back of the loan in his direct examination of Maria Meyers, defendant's wife [372A-373A]:

Q. Mrs. Meyers, I show you exhibit 16 and 17 and ask you if you can identify your signature on these two exhibits? A. Yes, sir.

Q. Would you please speak up. A. Yes, sir.

Q. Now, you signed these receipts in December, Exhibit 17 in December of 1972 and Exhibit 16 in September of 1972? A. Yes, sir.

Q. Did you understand that you were signing a receipt for the repayment of a loan that your husband had made in a prior year? A. Sir, I signed the receipt—

Q. Answer my question.

Did you understand that you were signing a receipt for repayment of a loan that your husband had made in the prior year? A. No.

Q. What did you understand this was for? A. Before my father died, he always told me I had share or piece of the firm. He told my brother that he would always give it to me.

[The Court took a recess]

The Court: Proceed, Mr. Gallop.

Mr. Gallop: Could the reporter read the last question?

The Court: No, just frame the next question.

The death of her father has nothing to do with this case. Let's go on and talk about the case.

Mr. Gallop: I have no further questions.

The Court's refusal to allow defense counsel to pursue the critical issue of willfulness in the development of a defense for his client was a serious abuse of discretion.

The Government uses its "badges of fraud" argument *ad nauseam* in summation as a sword to get around the restriction that only relevant testimony is admissible. The result is that the Government uses its tainted evidence. [Point II *supra*] for anything it pleases without reference to the limited issue of willfulness for which the lower court originally admitted it. However, when defense counsel wants to go to the very heart of that element of the case and show what defendant contended the \$25,000 was for, or what he thought it was for, in order to negate willfulness, relevance now becomes the Government's shield. All of a sudden nothing the defendant did or believed has any bearing on the case. What became of "wide latitude" to the defense on "willfulness"? What became of that essential element of a fair trial that both sides be treated with equal consideration and evenhandedness?

In a case where the trial court excluded proffered evidence that a Government witness had misdescribed the fraud attendant to a perjury conviction of a former internal revenue agent the court stated:

"Although the trial judge had broad discretion when ruling on the relevance of proffered evidence *it is imperative that on any given issue the same standard be applied to both parties*. It was error to give the prosecutor enough latitude to develop his fraud referral contention while applying a narrower standard of relevance to appellants attempt to make a fair response to that contention." [Emphasis supplied] *United States v. Parker*, 447 F.2d 826, 832 (7th Cir.

1971) See also *United States v. Wolfson*, *supra*, 437 F.2d at 874-5.

Nothing less has occurred here. Point II, *supra*, demonstrated how the Court admitted all sorts of irrelevant and prejudicial material on the Government's case, some of which was in the same area of inquiry to wit: the \$25,000 bad debt. Absent a reversal and remand, a jury and this court will never know that Mrs. Meyers would have testified that her father had always promised her and, indeed, owed her a share of his business both prior and after its sale to her brother, Marcelino Fernandez, the only other distributee of her father's estate. And these are facts which Fernandez would not have been able to deny had defense counsel been able to continue in its cross-examination of him.

There is inherent unfairness when one compares the trial court's restrictive treatment of defense counsel's case discussed herein with the wide latitude given the prosecutor discussed in the preceding point, and one realizes how very limited defense counsel was in development of defendant's evidence in light of the Government's virtual unlimited ability to admit irrelevant evidence at will. It is the contention of this defendant both that he was prejudiced severely by evidence with little or no probative value, and that he was not allowed to introduce on his own behalf relevant evidence negating his requisite intent to commit the crime alleged. Clearly, both contentions of defendant cannot be wrong. At the very least, what was fair to the Government must also be fair for the defendant. To do otherwise would be to deny this defendant a fair trial and the proof beyond a reasonable doubt to which he is entitled.

POINT IV

The Lower Court Erred in Refusing to Charge in Accordance With Defendant's Request No. 3.

In Request No. 3 of the Requests to Charge, the defendant requested the following instruction to the jury:

"If, after considering all the evidence before you against the defendant, you find the evidence reasonably permits two conclusions—one consistent with his innocence and the other consistent with guilt—you must accept the conclusion of innocence and acquit the defendant. For, then, the Government has not met its duty of proving the defendant's guilt beyond a reasonable doubt; and the presumption of innocence has not been overcome." [11A]*

The trial court refused to so charge. [420A-421A]**

This charge, or one substantially similar to it, is the accepted law of the State of New York.*** Moreover, this court has on numerous occasions approved similar charges. *United States v. Cacchillo*, 416 F.2d 231, 234 (2d Cir. 1969); *United States v. Armone*, 363 F.2d 385, 393 (2d Cir.), cert. denied 385 U.S. 957 (1966); *United States v. McConney*, 329 F.2d 467, 469 (2d Cir. 1964); *United States v. Shapiro*, 103 F.2d 775, 776 (2d Cir. 1939).

In *Armone*, defendant had been convicted of conspiracy to violate the Federal Narcotics Laws, 21 U.S.C. §§ 173 and

* See also the last paragraph of Request No. 2 [10A].

** The trial court specifically preserved any exceptions to any charge which was requested but not given in substance.

*** *People v. Fitzgerald*, 156 N.Y. 253, 50 N.E. 846 (1898); *People v. Trimarchi*, 231 N.Y. 263, 131 N.E. 910 (1921); *People v. Gilbert*, 72 Misc.2d 75, 338 N.Y.S.2d 457 (N.Y.C. Crim. Ct. 1972).

174. Section 174 provides that where the defendant was shown to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. The Appellant did not testify at the trial and objected to the trial court's charge on the inference of Section 174 since the judge failed to make clear that the defendant was not required to personally testify and that the explanation could come from other evidence in the case. This Court rejected that argument on the basis that the trial court adequately charged at other points (i) that no inference could be drawn from the defendant's failure to take the stand and testify and (ii) as to the standard of reasonable doubt. This Court quoted with approval other portions of his charge on the question of reasonable doubt including the following:

"But I remind you again that after considering all the evidence as to a particular defendant you find that two reasonable inferences may be drawn, one consistent with his innocence and one consistent with his guilt, you must acquit the defendant.***" 363 F.2d at 393.

This is the identical charge which the trial court in the instant matter refused to give.

In *Cacchillo*, the defendant was convicted on a charge of using the mails to defraud in violation of 18 U.S.C. §§ 1341 and 1342. The Appellant contended that the charge on reasonable doubt was confusing to the jury because the trial court used the word "reason" in defining the term and because the court instructed the jury that it must acquit "if it can draw two conclusions reasonably; one that he is innocent and one that he is guilty." 416 F.2d at 233. This Court found the charge not to be confusing and noted, 416 F.2d at 234, that a charge in practically these same words had been approved in *United States v. Shapiro*, 103 F.2d 775, 776.

In the latter case this Court approved a charge covering the duty of the jury to acquit "if the testimony is as consistent with innocence as with guilt." 103 F.2d 776.

In *McConney*, the defendant had been convicted of violating the Mann Act, 18 U.S.C. §2421. In an opinion reversing the convictions, then Circuit Judge Marshall quoted with approval from *McTyre v. United States*, 213 F.2d 65, 67 (5th Cir. 1954) where it was stated:

"It seems to us contrary to the well settled rule that to sustain the conviction the inferences reasonably to be drawn from the evidence must not only be consistent with his guilt but inconsistent with every reasonable hypothesis of his innocence. *** "

In view of the cited authorities, we would respectfully urge that the enunciated rule be adopted in cases such as the one *sub judice*. One of the important issues to be determined by the jury is whether the defendant had the "bad purpose or evil motive" required by *United States v. Murdock* and *United States v. Bishop* in understating his income for the years in question. If the jury determined that the evidence reasonably permitted two conclusions, one of which was consistent with his innocence, they obviously had a reasonable doubt as to his guilt and should have acquitted. Accordingly, it was error not to grant the requested charge.

The failure to charge as requested on this element is especially grievous in the instant case in light of the circumstances specified above where the basic facts were not in dispute. The Government contended that the evidence showed that the defendant had acted willfully. The defendant contends that the Government failed to show more than gross negligence. Thus, the jury should have been clearly instructed that if under any view of the evidence

they were able to conclude that the defendant was innocent, they had a duty to acquit him. Moreover, it was vitally important to clarify the instructions on reasonable doubt in this case where the trial court had committed grievous error by admitting into evidence irrelevant and immaterial evidence (See Point II, *supra*) and where the defendant was not allowed to fully develop one of his significant alternative conclusions as to what the facts should mean to the jury (See Point III, *supra*). In the totality of these circumstances, the requested charge should have been granted and accordingly, the conviction should be reversed.

CONCLUSION

For Each of the Above Stated Reasons, the Judgment of Conviction Should be Reversed and the Case Remanded For New Trial.

Respectfully submitted,

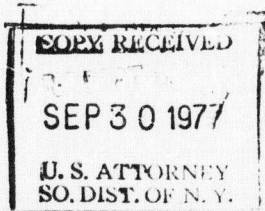
STEIN ROSEN & OHRENSTEIN
Attorneys for Defendant-Appellant
1370 Avenue of Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

MANFRED OHRENSTEIN

On the Brief:

LEWIS M. LEFKOWITZ
MARC R. LEVENTHAL



Appeal Reproductions, Inc., 217 Broadway, New York, N.Y. 10007, Tel.: 233-6626